Supreme Court, U.S.
FILED
SEP 8 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

Petitioner,

v.

MARVIN MANDEL, GOVERNOR, LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY, AND JOHN LUETKEMEYER, TREASURER, CONSTITUTING THE BOARD OF PUBLIC WORKS OF MARYLAND; JAMES B. CAINE, INC., A MARYLAND CORPORTION, AND MARYLAND MARINE PROPERTIES, INC., A MARYLAND CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT, JAMES B. CAINE, INC., IN OPPOSITION

ROBERT B. BARNHOUSE,
JOSEPH G. FINNERTY, JR.,
900 First National Bank Bldg.
Baltimore, Maryland 21202,
LEE W. BOLTE,
Berlin, Maryland,
Counsel for the Respondent,
James B. Caine, Inc.

The Daily Record Co., Baltimore, Md. 21203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

Petitioner,

v.

MARVIN MANDEL, GOVERNOR, LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY, AND JOHN LUETKEMEYER, TREASURER, CONSTITUTING THE BOARD OF PUBLIC WORKS OF MARYLAND; JAMES B. CAINE, INC., A MARYLAND CORPORTION, AND MARYLAND MARINE PROPERTIES, INC., A MARYLAND CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT, JAMES B. CAINE, INC., IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 261 Md. 436 and 276 A. 2d 56. The opinion of the Circuit Court for Worcester County, Maryland is unreported.

JURISDICTION

Jurisdiction is asserted by the petitioner pursuant to 28 U.S.C. 1257(3).

This respondent asserts, however, that the judgments sought to be reviewed were entered by the Court of Appeals of Maryland on November 16, 1970 and April 12, 1971 and the Petition was filed on August 9, 1971, more than ninety days after the entry of said judgments. This Court has no jurisdiction to entertain this Petition. 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to entertain this Petition since it was filed more than ninety days after the entry of the judgments by the Court of Appeals of Maryland.

2. Whether the issues decided below (i.e., the dismissal of an appeal because of late filing and the lack of petitioner's standing to sue) involve federal questions of substance.

STATUTE AND RULES INVOLVED

28 U.S.C. 2101:

> "(c) Any other appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * *."

Rule 812, Maryland Rules of Procedure:

> "(a) Whenever an appeal to this Court [Court of Appeals of Maryland] * * * is permitted by law, the order for appeal * * * shall be filed within thirty days from the date of the judgment appealed from, * * *."

Rule 870, Maryland Rules of Procedure:

> "Except as otherwise provided by Rules 835 (Dismissal of Appeal) and 871 (Remand), this Court will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended. The decision of this Court shall be final and conclusive."

Rule 876, Maryland Rules of Procedure:

> "(a) The order of this Court dismissing an appeal or affirming or reversing in whole or in part, or modifying the judgment from which the appeal was taken, or awarding a new trial, or entering a final judgment pursuant to Rule 875 (Final Judgment in This Court) shall be evidenced by the mandate of this Court which shall be certified under the seal of this Court by the Clerk. It shall not be necessary for any formal order or judgment other than the mandate to be signed or transmitted to the lower court.
>
> "(b) Unless otherwise ordered by this Court, the mandate shall be issued as of course by the Clerk upon the expiration of thirty days after the opinion of this Court has been filed or the order of judgment of this Court has been entered, and shall be transmitted by him to the lower court."

STATEMENT OF THE CASE

Petitioner filed suit against the Board of Public Works of Maryland (Board), this Respondent and another Maryland corporation seeking to set aside conveyances of land from the Board to the corporate respondents. Petitioner brought the suit in her capacity as a Maryland taxpayer and alleged that the conveyances in question of a portion of the submerged land lying between the high-water lines and the bulkhead lines adjacent to the shore of two bays in Worcester County, Maryland, would have a deleterious effect upon the environmental conditions of the bays.

All respondents challenged the legal sufficiency of the complaint by demurrer and the trial court sustained their demurrers.

The Petitioner noted a timely appeal from the adverse decision in favor of the Board and the Co-Respondent, Maryland Marine Properties, Inc. Her appeal of the ruling in favor of this Respondent was not filed within the thirty day period required by Maryland Rule 812(a) and, accordingly, on November 16, 1970, the Court of Appeals of Maryland dismissed her appeal.

On April 12, 1971, the Court of Appeals entered a judgment affirming the order of the trial court in favor of the Board and the Co-Respondent, Maryland Marine Properties, Inc. That decision was based solely on the ground that the Petitioner did not have standing to prosecute the suit.

This Petition was filed on August 9, 1971, 266 days after the entry of judgment in favor of this Respondent and 119 days after the entry of judgment in favor of the Co-Respondents.

ARGUMENT

I.

THIS COURT HAS NO JURISDICTION TO ENTERTAIN THE PETITION BECAUSE IT WAS FILED MORE THAN NINETY DAYS AFTER THE ENTRY OF THE JUDGMENTS OF WHICH REVIEW IS SOUGHT.

An order by the Court of Appeals of Maryland dismissing an appeal or affirming a judgment of a lower court constitutes a final judgment rendered by the highest Maryland court in which a decision may be had. Maryland Rule 870.

The order dismissing the appeal against this Respondent was entered on November 16, 1970. The order affirming the judgment in favor of the Co-Respondents was entered on

April 12, 1971. Both events occurred more than ninety days prior to the filing of the Petition.

Petitioner's contention that time should be measured from the date of issuance of the court's mandate is without merit. The entry of an order dispositive of an appeal constitutes a final judgment. That is the time "when the issues are adjudged." *Market Street R. Co. v. Railroad Com. of Cal.*, 324 U.S. 548, 551, 89 L. Ed. 1171, 1180, 65 S. Ct. 770 (1945). The subsequent issuance of the mandate is a routine function of the court clerk and is done simply to provide official evidence of the court's action. Maryland Rule 876.

It is clear that the issues raised by the Petition were adjudged by the Court of Appeals of Maryland more than 90 days prior to the filing of this Petition. This Court has no jurisdiction to entertain the Petition. 28 U.S.C. 2101(c).

II.

THE ISSUES DECIDED BELOW DID NOT INVOLVE FEDERAL QUESTIONS OF SUBSTANCE.

It is axiomatic that this Court will consider only those questions which were decided by the court below. The questions decided by the Maryland Court of Appeals and which were dispositive of this litigation involved the application of a local rule of procedure to the dismissal of an appeal because of late filing and a decision concerning the availability of Maryland's judicial machinery for the entertainment of a taxpayer suit.

The first question, involving the dismissal of the appeal against this Respondent presented the simple application of Maryland Rule 812(a) requiring an appeal to be noted within thirty days after the adverse ruling below.

The second question involved the application of the long-standing Maryland rule that Maryland taxpayers have no standing to prosecute actions in the Maryland courts challenging the validity of state action unless they show that the challenged action caused them a pecuniary loss or resulted in an increase of their taxes.

So long as the Maryland court in denying standing to the petitioner did not decide a federal question either directly or indirectly, this Court, based on its prior decisions, should not grant standing to the petitioner. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275 (1961).

The Maryland Court of Appeals did not incorrectly pass upon the propriety of any state action. Its decisions are in accord with its past decisions; they are in accord with the decisions of this Court; and they do not depart from the accepted and usual course of judicial proceedings. In short, the decisions do not present issues on important federal questions which should be settled by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT B. BARNHOUSE,

JOSEPH G. FINNERTY, JR.,

LEE W. BOLTE,

Counsel for the Respondent,
James B. Caine, Inc.

September 7, 1971.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 1971, three copies of this Brief in Opposition were mailed, postage prepaid to Leonard J. Kerpelman, 2403 Rogers Building, Baltimore, Maryland, 21209, counsel for the Petitioner. I further certify that all of the parties to be served have been served.

ROBERT B. BARNHOUSE,

Counsel for the Respondent,
James B. Caine, Inc.